

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4198

77-4198

To be argued by
ROBERT M. ZISKIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

-and-

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION
OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO,

Intervenor,

-against-

INDEPENDENT ASSOCIATION OF STEEL FABRICATORS, INC.;
ACHILLES CONSTRUCTION CO., INC.; GREENPOINT ORNAMENTAL
AND STRUCTURAL IRON WORKS, INC.; HEUSER IRON WORKS, INC.;
IKENSON IRON WORKS, INC.; KUNO STEEL PRODUCTS CORP.;
MASTER IRON CRAFT CORP.; MELTO METAL PRODUCTS CO., INC.;
MOHAWK STEEL FABRICATORS, INC.; THE PEELE COMPANY; ROMAN
IRON WORKS, INC.; SPIGNER AND SONS STRUCTURAL STEEL CO.,
INC.; S. CERVENKA AND SONS, INC.; PAXTON METALCRAFT CORP.,
DIVISION OF APEX INDUSTRIES, INC.; KOENIG IRON WORKS, INC.;
TROJAN STEEL CORP.; G. ZAFFINO AND SONS, INC.; ROMA
IRON WORKS, INC., and SHOPMEN'S LOCAL UNION NO. 455,
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND
ORNAMENTAL IRON WORKERS, AFL-CIO,

Respondents,

-and-

LOCAL 810, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Intervenor.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR INTERVENOR, LOCAL 810, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN,
AND HELPERS OF AMERICA, AFL-CIO.

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.	i
PRELIMINARY STATEMENT	2
STATEMENT OF THE ISSUES PRESENTED	3
STATEMENT OF THE FACTS.	4
<u>ARGUMENT</u>	
POINT - THE EXECUTION OF COLLECTIVE BARGAINING AGREEMENTS WITH LOCAL 810 WERE LAWFUL AND PROPER	12
CONCLUSION.	16
ADDENDUM.	17

TABLE OF AUTHORITIES

	<u>PAGE(S)</u>
<u>Cases:</u>	
<u>Hi-Way Billboards, Inc., 206 N.L.R.B.</u> 22.	13
<u>N.L.R.B. v. Hi-Way Billboards,</u> <u>Inc., 473 F 2d 649 (1973)</u>	13
<u>N.L.R.B. v. Siebler Heating & Air</u> <u>Conditioning, Inc., 563 F 2d 366</u> <u>CA 8 (1977)</u>	13, 14
<u>Statutes:</u>	
National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, <u>et seq.</u>)	2, Addendum, 18
Section 2(11)	Addendum, 18
Section 8(a)(1)	Addendum, 18
Section 8(a)(2)	Addendum, 18
Section 8(a)(3)	Addendum, 18
Section 8(a)(5)	Addendum, 18
Section 10(e)	2
<u>Miscellaneous:</u>	
NLRB Statement of Procedures, Section 101.10(b)	14

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BRIEF FOR INTERVENOR, LOCAL 810,
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CHAUFFEURS, WAREHOUSEMEN, AND HELPERS
OF AMERICA, AFL-CIO.

PRELIMINARY STATEMENT

This case is before the Court upon the application of the National Labor Relations Board, (herein the "Board"), for enforcement of a Decision and Order which issued on August 11, 1977. The Board's decision is reported at 231 NLRB No. 31 (A. 2197-2198).^{1/} This Court has jurisdiction under Section 10(e) of the National Labor Relations Act, as amended, (herein the "Act"), (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Section 151 et seq). The Board is seeking enforcement of its Order as issued against the Independent Association of Steel Fabricators, Inc., (herein the "Association"), an association of employers.^{2/}

Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (herein "Local 810"), was granted leave to intervene by Order of this Court dated February 3, 1978.

^{1/} Record references are to the pages of the Appendix.

^{2/} The employer-members named as respondents are as follows:

Achilles Construction
Cervanka and Sons
Greenpoint Ornamental
Heuser Iron
Ikenson Iron
Koenig Iron
Kuno Steel
Long Island Steel
Master Iron Craft

Melto Metal
Mohawk Steel
Paxton Metalcraft
Peele Company
Roma Iron
Roman Iron
Spigner and Sons
Trojan Steel
Zaffino and Sons

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence upon the record as a whole supports the Board's findings that various member-employers of the Association rendered unlawful assistance and support to Local 810 in violation of Sections 8(a)(1), (2) and (5) of the Act?

2. Whether substantial evidence upon the record as a whole supports the Board's findings that various member-employers of the Association violated Sections 8(a)(1), (2) and (3) and (5) of the Act by recognizing Local 810 as the representative of their employees?

3. Whether substantial evidence upon the record as a whole supports the Board's finding that the Association and certain member-employers thereof violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain in good faith with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, (herein "Local 455"), as representative of employees in an appropriate multi-employer unit.

4. Whether substantial evidence upon the record as a whole supports the Board's finding that the Association and certain member-employers

violated Sections 8(a)(5) and (1) of the Act by refusing to sign the collective bargaining agreement, dated January 23, 1976, entered into between Local 455 and certain member-employers of the Association?

STATEMENT OF THE FACTS

For a period of years, respondent-employers, Achilles Construction Co., Inc.; Greenpoint Ornamental and Structural Iron Works, Inc.; Heuser Iron Works, Inc.; Ikenson Iron Works, Inc.; Kuno Steel Products Corp.; Long Island Steel Products Co., Inc.; Master Iron Craft Corp.; Melto Metal Products Co., Inc.; Mohawk Steel Fabricators, Inc.; The Peele Company; Roman Iron Works, Inc.; Spigner and Sons Structural Steel Co., Inc.; S. Cervenka and Sons, Inc.; Paxton Metalcraft Corp., Division of Apex Industries, Inc.; Koenig Iron Works, Inc.; Trojan Steel Corp.; G. Zaffino and Sons, Inc., and Roma Iron Works, Inc., have been engaged in the steel and erecting industry in the metropolitan area.

During such period, the production and maintenance employees of the previously named employers were represented by Local 455 pursuant to separate collective bargaining agreements. However, at certain points in time, some of the above named employers

were members of a industry trade association known as "Allied Building Metals Industries, Inc.", (herein referred to as "Allied").

For a number of years, the Allied, on behalf of its member employers, has negotiated multi-employer collective bargaining agreements with Local 455. Such agreements have set the pattern of labor negotiations in the industry and such contracts have consummated only as a result of long and torturous strikes. Such contracts have formed the basis of all economic settlements between Local 455 and the independent employers in the industry. Such independent employers have never been afforded the opportunity of negotiating with Local 455 with respect to the contributions to be paid to Local 455's Health, Welfare, Pension and other fringe benefit funds. (A. 384).

As set forth in the record, the members of the Allied were and have been at all times material herein, in direct competition with the industry's independent employer, and as the record and the exhibits introduced in the record reveal, the Allied has continued to receive more favorable terms and conditions of employment. (A. 175).

As the record further reveals, although independent employers were promised by Local 455 that they would receive the same contract terms as set

forth in the Allied's contract, such promises never came to fruition. Moreover, members of the Allied who withdrew from such organization were never granted independent contracts embodying the terms and conditions in the Allied contract. (A. 689, 721, 722).

As a result of the independent employers' inability to negotiated independently with Local 455 and in light of the fact that Local 455 consistently declined to treat independent employers on a parity with the Allied, the named employers in the instant proceeding banned together in or about the early part of 1975 and formed the Association.

As revealed by the record, Local 455 initially refused to recognize four of the charter members of the Association, notwithstanding the fact that the representative of Balfour was a member of the Association's negotiating committee. (A. 1884 and 1885).

The initial bargaining sessions between the Association and Local 455 centered on the Association's desire to gain assurances from Local 455 that it would incorporate various contractual provisions in any contract it entered into with it which provisions had been historically included in contracts between Local 455 and the Allied.

Significantly, these negotiations were marked by Local 455's failure to give any indication as to the wage increases and increases in fringe benefits that it was seeking to negotiate. In this connection, Local 455 took the position that the Association and its member employers would have to accept the wage and fringe benefit package negotiated between it and the Allied and that the Association would not have any say with regard to such matters.

Subsequently, on July 1st, an industry wide strike commenced, notwithstanding the fact that Local 455 had not as yet presented its economic demands to the Association. (A. 200, 201, 206).

During the month of July, the record reveals that there were no bargaining sessions between Local 455 and the Association, although Local 455 did successfully enter into a number of one year stipulations with various unaffiliated companies.

Significantly, the local union made no effort to advise the Association as to the terms and provisions of such independent stipulation agreements.

In or about August, Dextra Industries, Inc., a member of the Independent, entered into a separate collective bargaining agreement with Local 455.

Significantly, the regional director for Region 2 of the Board, upon considering Dextra's contractual agreement with Local 455 in light of

Dextra's withdrawal from the Association, concluded that a bargaining impasse had been reached between Local 455 and the Association and that Dextra was free to execute an independent contract with Local 455. (*Respondents' Exhibit 8*).

Thereafter, Local 455 subsequently entered into a series of separate contracts with such employers as Atwater, North Shore, Charla, Penner, Balfour, Esco and Weatherguard, who were then members of the Association. (A. 119, 120, 18, 19, 20, 21, 155).

As a result of Local 455's decimation of the Association as a multi-employer association, the Association advised its members that it could no longer request or require them to bargain on a multi-employer basis. (A. 1897).

Nevertheless, in August, one further negotiation session was held between the Association and Local 455. In this session, Local 455, for the first time, indicated its wage demands and stated that it would negotiate fund contributions only through bargaining with the Allied.

Thereafter, during the months of September, October, November and December, sporadic "negotiation sessions" were held between Local 455 and the Association. In this regard, the record indicates that Local 455 made no effort during such bargaining

sessions to make meaningful contract proposals or to be represented at such meetings by persons having authority to bind the union.

In or about January of 1976 at the direction of the International Union, members of Local 455 voted to accept a last offer as proposed by the Allied, although such proposal had been rejected out of hand by Local 455's leadership.

Upon learning of the industry settlement, the Association caused a meeting to be held with Local 455 at which time the Association negotiating committee indicated that it would prepare and recommend that its member-employers accept the same settlement as that reached between Local 455 and the Allied. This proposal was flatly rejected by the local union. (A. 1921).

Apparently, as a result of Local 455's refusal to accept the Association's proposal concerning the Allied agreement and in recognition of the Board's determination that an impasse in bargaining had previously come to pass, the Association notified its members that they were free to act independently and in their own self interests. (*Respondents' Exhibit 17 and see testimony of employer-representatives Kaplan, Doyle and Udyssse*).

At an Association meeting called to discuss this situation, some five member-employers expressed a willingness to accept the Allied settlement and such employers were granted permission from the Association to negotiate separately with Local 455 on their own respective behalves. (A. 1054).

As the record tends to reveal, the Association's negotiating committee had authority to negotiate and recommend proposals to its membership, but ratification and final acceptance of such proposals was maintained by the membership. (A. 1883 and 1884). Thus, the negotiations entered into between Local 455 and the five named employers did not constitute negotiations between the local union and the Association. Rather, each of the above named employers signed contracts with Local 455 in their individual capacities and as the record amply reflects, such employers were forced to sign "as a member of the Independent Association" after their respective signatures by Union representative Colavito. In this connection, the record reveals that representative Colavito indicated that the inclusion of the phrase "as a member of the Independent Association" was nothing more than a statement of fact and did not indicate any representative status. (A. 1292). Moreover,

the Union took the position that it would not enter into binding collective bargaining agreements with the above named employers unless such employers agreed to sign such contracts with the salutation as set forth above.

As the record reveals, during the period November of 1975 through in or about January of 1976, a number of the former members of the Association having withdrawn from the Association and upon learning that their employees became members of Local 810, entered into collective bargaining agreements with Local 810.

In this connection, the series of events at Koenig Iron Works is instructive.

Although Koenig's employees for many years had been members of Local 455, such employees did not join in the July of 1975 strike. Rather, all of its employees continued to work and independently joined Local 810. Upon joining Local 810, such employees struck Koenig's premises, (A 1338 - 1349), at which time Koenig recognized, and on January 30, 1976, negotiated a collective agreement with Local 810.

ARGUMENT

POINT

THE EXECUTION OF COLLECTIVE BARGAINING
AGREEMENTS WITH LOCAL 810 WERE LAWFUL
AND PROPER

As previously noted, in November of 1975, (R. 8), the Regional Director for Region 2 administratively concluded that a legitimate impasse had been reached in bargaining between the Association and Local 455. In this regard, the Region concluded that a separate collective bargaining agreement reached between Dextra and Local 455 occurred subsequent to the collapse in negotiations. Specifically, the Director held:

"...the evidence establishes that collective bargaining negotiations took place between the parties for some time prior to June 30, 1975, at which time a legitimate impasse was reached and negotiations ceased."

Given the background that no bargaining sessions were held in July; that only one session was held in August; that only a minimal number of non-productive sessions were held in the remaining months of 1975, and that only one session was held in 1976, it must be acknowledged that a legitimate impasse was reached between the Association and Local 455 by in or about the mid-summer of 1975.

Where, as in the instant case, the parties have reached an impasse in bargaining, such an impasse justifies and warrants a unilateral withdrawal from a multi-employer bargaining unit. Hi-Way Billboards, Inc., 206 NLRB 22; N.L.R.B. v. Hi-Way Billboards, Inc., 473 F.2d 649 (1973).

Although the Board in Hi-Way Billboards, Inc., supra, restated the proposition that an employer may not withdraw from a multi-employer bargaining association merely on the basis of an impasse, the Board went on to hold that "unusual circumstances" would justify an employer's withdrawal.

In the instant case, one need merely examine the record to reach the conclusion that at the time of the impasse, the instant employers were confronted with dire economic circumstances, which circumstances impeded their continued existence.

Given Local 455's refusal to engage in meaningful bargaining with the Association and its member employers, and given the unquestionable dire economic conditions of such employers, this Court is presented, as alluded to in Hi-Way Billboards, supra, with a case of "unusual circumstances."

Significantly, in the most recent case of N.L.R.B. v. Siebler Heating & Air Conditioning, Inc.,

563 F 2d 366 CA 8 (1977), the Eighth Circuit Court of Appeals recognized that genuine economic distress could constitute such unusual circumstances as to justify employers' withdrawal from a multi-employer bargaining unit, even after negotiations had begun.

Where, as here, employers are confronted with a legitimate impasse coupled with genuine economic distress, it must be concluded that such "unusual circumstances" exist as to warrant withdrawal from a multi-employer bargaining unit, even after negotiations have begun.

Assuming arguendo that respondent-employers' withdrawal from the Association was justified, then one must examine the circumstances of such employers' recognition of Local 810 as the collective bargaining representative of their employees.

In the instant case, counsel for the General Counsel failed to comply with the provisions of Section 101.10(b) of the Board's Statement of Procedures. More specifically, the General Counsel failed to come forward or otherwise meet its burden of proof with respect to challenging the basis upon which certain employers entered into collective bargaining agreements with Local 810.

Clearly, the General Counsel failed to establish that Local 455, subsequent to reaching impasse with the Association, continued to represent a majority of respondent-employers' employees. Likewise, the General Counsel failed to establish that Local 810 did not in fact represent an uncoerced majority of employees of employers who ultimately executed Local 810 collective bargaining agreements. As a matter of fact, the record affirmatively reveals that Koenig Iron's employees not only abandoned their membership in Local 455, but voluntarily joined Local 810 prior to Koenig's entering into a collective bargaining agreement with Local 810.

CONCLUSION

For the foregoing reasons, this Court
is respectfully urged to deny enforcement of
the Order of the Board.

Dated: Great Neck, New York
March 23, 1978

MIRKIN, BARRE, SALTZSTEIN & GORDON, P.C.

By Robert M. Ziskin

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Of Counsel:
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A D D E N D U M

ADDENDUM

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et al) are as follows:

Section 2(11)

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

UNFAIR LABOR PRACTICES

Section 8 (a) It shall be an unfair labor practice for an employer -

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
- (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
- (3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization; ...
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

UNITED STATES COURT OF APPEALS
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FABRICATORS, INC., et al., :
:
Respondents. :
:
-and- :
:
LOCAL 810, IBTCWHA, :
:
Intervenor, :
----- X

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three
copies of the Intervenor's, Local 810, I.B.T.,
brief in the above captioned case, has this day
been served by first class mail upon each of the
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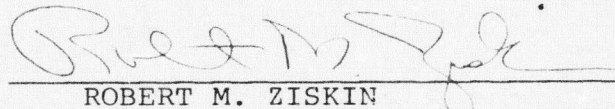
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March 23, 1978

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APPEALS FOR THE SECOND CIRCUIT
U.S. Courthouse
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New York, New York 10007

Re: National Labor Relations Board v. Shopmen's
Local Union No. 455, IABSOIR, AFL-CIO v.
Independent Association of Steel Fabricators,
Inc., et al., and Local 810, IBTCWHA.
No. 77-4198

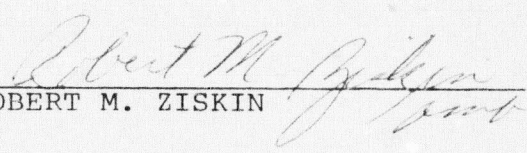
Dear Sir:

Enclosed herewith please find an original and
nine copies of brief submitted on behalf of
the Intervenor, Local 810, I.B.T., in
connection with the above matter.

Very truly yours,

MIRKIN, BARRE, SALTZSTEIN
& GORDON, P.C.

By


ROBERT M. ZISKIN

RMZ:pmb
Enclosures